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# LOCAL GOVERNMENT ANTI-DISCRIMINATION LAWS: DO THEY MAKE A DIFFERENCE?

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Chad A. Readler\*

*During the past decade, local governments have expanded their role protecting individuals from discrimination in private employment. Although federal and state laws already protect individuals from employment discrimination based on race, sex, color, religion, national origin, age, and disability, local anti-discrimination ordinances protect an even wider range of characteristics, such as sexual orientation, marital status, military status, and income level. The author details the results of a survey indicating that the agencies and dispute resolution processes mandated by local anti-discrimination ordinances are seldom used to protect this wider range of characteristics. He argues that effective, uniform anti-discrimination protection should come from the federal government.*

## INTRODUCTION

Legislation protecting individuals from discrimination in private employment has been enacted throughout the United States at the federal, state, and local levels.<sup>1</sup> While federal protection in employment is limited to characteristics such as race, sex, color, religion, national origin, age, and disability,<sup>2</sup> some local governments have expanded protection by also banning discrimination on the basis of characteristics such as sexual orientation, marital status, military status, and income level.<sup>3</sup> These ordinances raise interesting questions regarding

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1. See, e.g., 42 U.S.C. § 2000e-2 (1994 & Supp. 1997) (codifying Title VII of the Civil Rights Act); MICH. COMP. LAWS § 37.2102 (1985 & Supp. 1997) (barring discrimination in employment, housing, public accommodation, and education based on a wide variety of characteristics); ANN ARBOR, MICH., CODE ch. 112, § 9:154 (1995) (effective Mar. 13, 1978) (barring employment discrimination).

2. See 42 U.S.C. § 2000e-2 (1994 & Supp. 1997) (banning employment discrimination based on race, sex, color, religion, and national origin); 29 U.S.C. § 623 (1994 & Supp. 1997) (banning employment discrimination based on age); 42 U.S.C. § 12112(a) (1994 & Supp. 1997) (banning employment discrimination based on disability).

3. See, e.g., ANN ARBOR, MICH., CODE ch. 112, § 9:159 (1995) (barring employment discrimination based upon pregnancy, source of income, marital status, and

the impact local governments have on their communities. The author's survey of local governmental agencies and local anti-discrimination ordinances indicates that these local regulations have little impact on employment discrimination, and any impact that they have is not beneficial to employees, employers, or local governments.

Part I of this Note briefly examines how federal and state governments regulate private employment by adopting anti-discrimination laws, providing a model for comparison with local government regulations. Part II considers local governments' regulation and increasing participation in this area. Part III examines the results of the survey conducted as a part of this Note, concluding that local ordinances are poorly publicized, weakly enforced, and harmful to employers and other local governments. Part III also discusses other possible schemes for employment regulation, including complete federal and/or state pre-emption of the field or private sector control. This Note concludes that the federal government is the preferable level to regulate private employment law.

## I. FEDERAL AND STATE GOVERNMENT

### A. Federal Government

To understand how local anti-discrimination laws operate in practice, first it is necessary to consider how equal employment laws operate at the federal level. Title VII of the Civil Rights Act of 1964 bans discrimination in private employment on the basis of race, color, sex, religion, and national origin.<sup>4</sup> Federal law also prohibits discrimination on the basis of age and disability through the Age Discrimination in Employment Act of 1967 (ADEA) and the Americans with Disabilities Act (ADA).<sup>5</sup> Supplemental federal legislation and court decisions have interpreted and expanded these employment protections.<sup>6</sup>

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sexual orientation, except in the case of a "bona fide business necessity"; see also discussion *infra* Part II.B-D.

4. Pub. L. No. 88-352, §§ 701-718, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (1994 & Supp. 1997)).

5. Pub. L. No. 90-202, §§ 2-14, 81 Stat. 602, 602-07 (codified as amended at 29 U.S.C. §§ 621-34 (1994 & Supp. 1997)); Pub. L. No. 101-336, 104 Stat. 327, 327-78 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994 & Supp. 1997)).

6. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99, 801-02 (1973) (holding that a complaining party has a right to sue on charges about which

The Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination employment laws. Created in 1964 by section 705 of Title VII,<sup>7</sup> the federal agency currently employs nearly 3,000 people in its Washington, D.C. headquarters and its district offices throughout the country.<sup>8</sup> The district offices investigate thousands of employment discrimination complaints each year.<sup>9</sup> After the investigation, the EEOC determines whether there is reasonable cause to believe that unlawful discrimination has occurred.<sup>10</sup> The EEOC dismisses some cases at this point.<sup>11</sup> Others enter the conciliation process with the goal of reaching a mutually satisfactory agreement between the complainant, respondent, and Commission.<sup>12</sup> If a conciliation cannot be reached, the Commission's district office either (1) initiates litigation on behalf of the complainant after consultation with its regional attorney<sup>13</sup> or (2) issues a right to sue letter to the complaining party, allowing the party to bring a private civil action.<sup>14</sup> At this stage, all of the remedies provided under federal employment law, including back pay, front pay, and compensatory and punitive damages, are available to a complaining party.<sup>15</sup>

The federal government prohibits employment discrimination based upon limited characteristics. For example, the EEOC and federal courts uniformly have denied Title VII protection to gays and lesbians who have alleged employment discrimination based upon sexual orientation.<sup>16</sup> Neither the

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the EEOC has not made findings of reasonable cause and also setting out standards for establishing a *prima facie* case under Title VII).

7. Pub. L. No. 88-352, Title VII, § 705, 78 Stat. 258 (codified as amended at 42 U.S.C. § 2000e-4 (1994)).

8. See 2 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1205 (3d ed. 1996).

9. See *id.* at 1205, 1214-15 & n.74.

10. Many cases are settled before the EEOC makes its determination on reasonable cause, reducing the number of complaints which the EEOC has to investigate. See *id.* n.74.

11. 1 EEOC Compl. Man. (BNA) § 22.15, at 22:0012 (1988); Daily Lab. Rep. (BNA) No. 62, at E-5 (Apr. 20, 1995).

12. Section 706(b) of Title VII (incorporated by reference by the ADA) requires conciliation in the wake of a reasonable cause finding. See 42 U.S.C. § 2000e-5(b) (1994).

13. See 1 EEOC Compl. Man. (BNA) § 66.5, at 66:0002-03 (1989).

14. See 1 EEOC Compl. Man. (BNA) § 66.6, at 66:0003-04 (1989).

15. See 42 U.S.C. § 2000e-5 (1994).

16. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*4 (6th Cir. Jan. 15, 1992) ("The circuits are unanimous in holding that Title VII does not proscribe discrimination based on sexual activities or orientation."); EEOC Dec. 76-115, 1976 WL 40211, at \*1 (July 7, 1976) (holding that failure to hire a homosexual is not unlawful

EEOC nor the federal courts have found discrimination based upon sexual orientation to be a violation under Title VII.<sup>17</sup>

Congress has considered amendments that would give additional groups protection from discrimination in private employment. In 1996, both the Senate and the House of Representatives considered bills, referred to as the "Employment Non-Discrimination Act" (ENDA), which would have protected homosexuals from employment discrimination.<sup>18</sup> The Senate rejected ENDA by a vote of 50-49,<sup>19</sup> and the House did not vote on the measure.<sup>20</sup> Similar bills have been introduced in every Congressional session since 1975,<sup>21</sup> but Congress has declined to take this step toward protecting gays and lesbians against employment discrimination.

Despite its reluctance to protect additional groups, the federal government remains the leader in passing and enforcing anti-discrimination laws in private employment. Due to the federal government's superior resources and enforcement capabilities, its laws and regulations have had a significant impact in reducing certain types of discrimination in private employment.

### *B. State Government*

Most state governments also exert influence over private employers.<sup>22</sup> Federal law allows states to pass their own anti-discrimination laws.<sup>23</sup> Some states ban discrimination on the

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under Title VII); EEOC Dec. 77-28, 1977 WL 5343, at \*1 (Aug. 11, 1977) (holding that the discharge of a lesbian employee is not unlawful under Title VII).

17. See, e.g., EEOC Dec. 76-115, 1976 WL 40211, at \*1 (July 7, 1976) (citing *Willingham v. Macon Tel. Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc)).

18. Employment Non-Discrimination Act, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act, H.R. 1863, 104th Cong. (1995).

19. See Deb Price, *Anti-Discrimination Vote Shows Senate May Not Be So Chilly Toward Gay Rights*, DETROIT NEWS, Sept. 13, 1996, at E1.

20. See John E. Yang, *On Capital Hill: Gay Rights Measure*, WASH. POST, Mar. 9, 1997, at A7.

21. See Norma M. Riccucci & Charles W. Gossett, *Employment Discrimination in State and Local Government: The Lesbian and Gay Male Experience*, 26 AM. REV. OF PUB. ADMIN. 175, 196 n.1 (1996).

22. See, e.g., OHIO REV. CODE ANN. § 4112.03 (Anderson 1995) (establishing the Ohio Civil Rights Commission).

23. See *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 345 (9th Cir. 1996) (holding that Title VII of the Civil Rights Act only preempts inconsistent state laws).

basis of characteristics protected by federal law,<sup>24</sup> while other states ban discrimination on the basis of additional characteristics.<sup>25</sup>

Federal anti-discrimination law encourages close interaction between the EEOC, state, and local agencies when investigating discrimination complaints.<sup>26</sup> In fact, section 706 of Title VII requires that a charge must be filed with the state or local fair employment agency where the alleged discrimination took place before it may be filed with the EEOC.<sup>27</sup> Title VII, the ADA, and the ADEA all authorize the EEOC to enter into agreements with state and local fair employment agencies, and the EEOC often does so through "work-sharing agreement[s]."<sup>28</sup> Where the EEOC and the state or local agency have overlapping jurisdiction, the EEOC frequently turns over investigative and adjudicative responsibilities to the state or local agency.<sup>29</sup>

Most state agencies charged with investigating discrimination complaints are organized in a similar fashion to the EEOC. The Ohio Civil Rights Commission (OCRC), created by section 4112.03 of the Ohio Revised Code, is a state agency established for the primary purpose of investigating and adjudicating discrimination complaints.<sup>30</sup> Once an OCRC investigator fully investigates a complaint, the OCRC makes a determination as to whether there is probable cause to believe that a fair discriminatory employment practice occurred.<sup>31</sup> If the OCRC makes a finding of probable cause<sup>32</sup> and a settlement is

24. See 1 LINDEMANN & GROSSMAN, *supra* note 8, at 339 (1996); ARIZ. REV. STAT. ANN. § 41-1481(G), (J) (West 1992); IND. CODE ANN. § 22-9-1-6(k), (l) (West 1991 & Supp. 1997).

25. See, e.g., ILL. COMP. STAT. ANN. 68/8A-104(B) (West Supp. 1992) (permitting damages); R.I. GEN. LAWS § 42-87-4(a) (1993) (allowing compensatory and punitive damages to remedy disability discrimination by private employers); VA. CODE ANN. § 51.5-46 (Michie 1994) (allowing compensatory damages to remedy disability discrimination by private employers); see also 1 LINDEMANN & GROSSMAN, *supra* note 8, at 339.

26. See *infra* text accompanying notes 27-29.

27. See 2 LINDEMANN & GROSSMAN, *supra* note 8, at 1221.

28. See *id.* at 1222.

29. See *id.* at 1223.

30. OHIO REV. CODE ANN. § 4112.03 (Anderson 1995). Aggrieved parties may file directly in the state court for violations of the state anti-discrimination laws. See *id.* at § 4112.05.1(A)(1).

31. See *id.* at § 4112.05(B)(2).

32. If the Commission finds it improbable that a discriminatory action occurred, the Commission will not file a complaint. See *id.* at §§ 4112.05(B)(3)(a)(i), (B)(4). During my tenure at the OCRC, I found a number of complaints were either: 1) rejected immediately because no cause of action was stated; 2) rejected during the investigation because

not reached, it conducts a hearing where both sides may appear and argue the merits of their case.<sup>33</sup> The remedies available to an aggrieved party filing with the OCRC include back pay, hiring, reinstatement, promotion, actual damages, reasonable attorney's fees, and punitive damages.<sup>34</sup> Either party may appeal a negative ruling to the state court.<sup>35</sup>

Ohio law bans discrimination on the basis of the same characteristics protected by federal legislation,<sup>36</sup> but also bans discrimination based on sexual orientation in public employment.<sup>37</sup> Private employers are still immune to this executive order.<sup>38</sup>

Some states have gone further by legislating protections based upon characteristics other than sexual orientation or those covered by the federal government.<sup>39</sup> Wisconsin prohibits discrimination in private employment on the basis of marital status, arrest and conviction record, and military status.<sup>40</sup> New York protects genetic predisposition/carrier status and marital status.<sup>41</sup>

States take different approaches toward protecting characteristics and enforcing laws.<sup>42</sup> These variations are even more apparent at the local government level.<sup>43</sup>

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the complainant withdrew or failed to participate in the investigation; or 3) rejected after an investigation revealed that there was no probable cause.

33. See *id.* at § 4112.05(B)(5)-(F).

34. See *id.* at § 4112.05(G)(1).

35. See *id.* at § 4112.06(A).

36. See *id.* at § 4112.02(A).

37. See Note, *Constitutional Limitation Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1923-25 (1993).

38. See *id.* at 1924. A survey of the materials on anti-discrimination laws shows that a minority of states ban discrimination based on sexual orientation in public employment. California (1992), Connecticut (1991), Hawaii (1991), Massachusetts (1989), Minnesota (1993), New Jersey (1992), Rhode Island (1995), Vermont (1992), and Wisconsin (1982) have banned sexual orientation discrimination by statute. Maryland (1993), New Mexico (1985), New York (1983), Pennsylvania (1988), and Washington (1993) have banned sexual orientation by executive order like Ohio. See Riccucci & Gossett, *supra* note 21, at 179 tbl.1. These states represent only 30% of all states, and of these states, only California, Connecticut, Hawaii, Rhode Island, Massachusetts, Minnesota, New Jersey, Vermont, and Wisconsin ban discrimination in private employment based on sexual orientation. See Note, *supra* note 37, at 1923-25.

39. See *supra* Introduction.

40. WIS. STAT. § 111.31 (1993-94).

41. N.Y. EXEC. LAW § 296 (McKinney 1996).

42. See *supra* text accompanying notes 40-41.

43. See *infra* Part II.B.

## II. LOCAL GOVERNMENTS

Counties and cities throughout the United States have passed laws that ban discrimination in private employment.<sup>44</sup> Some local governments go further than both federal and state governments in granting protection in private employment based on characteristics such as sexual orientation, military status, marital status, and income level.<sup>45</sup>

### *A. Power of Local Governments to Enact Anti-Discrimination Ordinances*

Local governments lack much legal power in relation to federal and state governments. Under both state and federal constitutional law, "local governments have no rights against their states."<sup>46</sup> Richard Briffault explains the traditional view<sup>47</sup> of local government and the constraints on it:

The local government is a creature of the state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units. The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. Absent any specific limitation in the state constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges. The local

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44. See *id.* As compared to many other countries in the world, the United States is a leader in transferring power to lower levels of government. For example, the Japanese have recently considered plans to transfer some power from the central government to local governments. The concept of transferring power to local governments has been characterized as "a bold change in thinking" by the Japanese. See *Decentralization Must Be Balanced*, DAILY YOMIURI, Feb. 10, 1996, at 11, available in LEXIS, World Library, Allwld File.

45. See discussion *infra* Part II.B.

46. Richard Briffault, *Our Localism: The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

47. While Briffault's article examines the traditional beliefs and black-letter doctrine concerning local governments, Briffault himself believes that in many ways these doctrinal platitudes do not accurately reflect the real powers of local government. See *id.* at 1.



government is an agent of the state, exercising limited powers at the local level on behalf of the state.<sup>48</sup>

In the area of employment law, however, it has become increasingly clear that local governments are active and important players.<sup>49</sup>

The scope of power for local governments is further affected by two competing theories of local control: Dillon's Rule and home rule.<sup>50</sup> In the few states that adhere to Dillon's Rule, local governments can exercise only those powers "granted in express words" or "those necessarily or fairly implied in or incident to, the powers expressly granted," or "those essential to the declared objects and purpose of the (municipal) corporation—not simply convenient, but indispensable."<sup>51</sup> Dillon's Rule limits the transfer of power from the state to the local government by requiring that all powers of the local government be traced back to a specific delegation from the state.<sup>52</sup> When it is unclear whether a local government possesses a certain power, a court examining the challenged power must assume that the locality lacks that power.<sup>53</sup>

Under Dillon's Rule, a limited number of governmental bodies may regulate private activity.<sup>54</sup> Although many states no longer expressly follow Dillon's Rule,<sup>55</sup> some scholars believe the tradition of the Rule leads courts to construe local governmental powers narrowly.<sup>56</sup>

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48. *Id.* at 7-8. Briffault goes on to say that local governments are like narrow state agencies: "A local government is like a state administrative agency, serving the state in its narrow area of expertise, but instead of being functional specialists, localities are given jurisdictions primarily by territory, although certain local units are specialized by function as well as territory." *Id.* at 8.

49. See discussion *infra* Part II.B.

50. See Briffault, *supra* note 46, at 8-11.

51. *Id.* at 8 (emphasis omitted); see also D. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS 83 (2d ed. 1983).

52. See Briffault, *supra* note 46, at 8. The effects of Dillon's Rule on local governments can be powerful. One study reported that the Rule "sends local government to State legislatures seeking grants of additional powers; it causes local officials to doubt their power, and it stops local governmental programs from developing fully." ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONST. AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOV'T 24 (1962).

53. See *id.*

54. See *id.*

55. See *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1120 (Alaska 1978); *State v. Hutchinson*, 624 P.2d 1116, 1124 (Utah 1980) (citing decisions of eight states).

56. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1112-13, 1115 (1980).

The home rule concept came about as a response to the restrictive nature of Dillon's Rule.<sup>57</sup> In the late nineteenth and early twentieth centuries, many states adopted constitutional amendments intended to protect local autonomy.<sup>58</sup> Numerous local government anti-discrimination ordinances have since been adopted by localities throughout the United States.<sup>59</sup>

A majority of states have amended their constitutions to strengthen the powers of local governments and provide for municipal home rule.<sup>60</sup> A smaller number of states have granted home rule by state statute.<sup>61</sup> The first of two home rule models treats the home rule municipality as "*an imperium in imperio*, a state within a state." The municipality possesses full police power in municipal affairs and maintains some degree of immunity from state legislative interference.<sup>62</sup> The second home rule model is the more modest "legislative model."<sup>63</sup> It enhances local lawmaking powers but gives state governments some influence over local matters.<sup>64</sup> The legislative model grants to local governments all possible powers, subject only to the state legislature's authority to "restrict or deny localities a particular power or function."<sup>65</sup>

Local governments, however, may not enact laws that conflict with state statutes or regulations.<sup>66</sup> A local ordinance, even in imperio home rule states, may not conflict with a state

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57. See *id.* at 1116-17.

58. See *id.*; see also MANDELKER ET AL., *supra* note 51, at 101.

59. See discussion *infra* Part II.B-D.

60. See CAL. CONST. art. XI, § 5 (permitting local municipal governments to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws"); N.Y. CONST. art. IX, § 2(c) ("In addition to powers granted in the statute of local governments or in any other law . . . every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government . . .").

61. See DEL. CODE ANN. tit. 22, §§ 801-36 (1997); N.J. STAT. ANN. §§ 40:69A-29 to -30 (West 1992). Whether through statute or constitutional amendment, today forty-one states have some form of home rule. See Briffault, *supra* note 46, at 10-11.

62. See Briffault, *supra* note 46, at 10.

63. See *id.*

64. See *id.*

65. See *id.* at 10-11 n.24.

66. See, e.g., *New York State Club Ass'n v. City of New York*, 505 N.E.2d 915, 917 (N.Y. 1987) (noting that "[l]ocal government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law . . ."), *aff'd*, 487 U.S. 1 (1988); 1 CHESTER JAMES ANTIEAU, *MUNICIPAL CORPORATION LAW* § 5.35, at 5-154 (1997).

statute unless it is primarily a matter of local concern.<sup>67</sup> Even under liberal home rule provisions, local governments are still confined to passing laws that are consistent with, or at least not inconsistent with, state law and practice.<sup>68</sup>

Several examples illustrate how home rule powers operate. Louisiana's state constitution delegates powers to home rule local charter governments, granting them the discretion to deploy their powers at the local level.<sup>69</sup> While the Louisiana legislature has the power to deny or revoke an initial delegation of home rule powers, article VI, section 6 of the state constitution prevents the legislature from affecting, changing, or revoking a local government's discretion to deploy its powers and functions unless it is necessary to prevent an abridgment of "a reasonable exercise of police power."<sup>70</sup> Thus, the Louisiana Constitution bestows considerable structural autonomy on home rule governments.<sup>71</sup>

Acting under a grant of home rule power, the City of New Orleans adopted an anti-discrimination ordinance in 1992.<sup>72</sup> The city bans discrimination in private employment based upon characteristics including race, sex, national origin, and sexual orientation.<sup>73</sup> Violation of this ordinance may result in

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67. See Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1199-1200 (1992). See also *City of Denver v. Colorado River Water Conservation Dist.*, 696 P.2d 730, 740 (Colo. 1985) (noting that local legislation pertaining to purely local matters supersedes conflicting state statutes); *Novak v. Perk*, 413 N.E.2d 784, 786 (Ohio 1980) ("[M]unicipal exercises of authority which involve powers of local self-government ordinarily prevail over general state laws.").

68. Home rule authority changes an attorney's legal inquiry from a search for a pertinent authorization under state law to a specific pertinent exception by the state. See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 678 (1973). In other words, the attorney asks "why not?" instead of asking "why." This result does not necessarily guarantee more freedom to local governments. It is possible that states operating under a non-home rule regime may make generous grants of power to local governments, while home rule states may reserve large amounts of power to the state government. See *id.* Though a rough survey of American jurisdictions tends to show that local governments operating in home rule regimes are more likely to operate with more control and greater freedom, the possibility of states specifically withholding power from local governments prevents this observation from being a truism. See *id.*

69. See LA. CONST. art. VI, §§ 5-6; *Francis v. Morial*, 455 So. 2d 1168, 1169 (La. 1984) (upholding municipal discretion).

70. *Francis*, 455 So. 2d at 1169.

71. See *American Waste & Pollution Control Co. v. St. Martin Parish Police Jury*, 609 So. 2d 201, 202 (La. 1992).

72. See Telephone Interview with Dorinda Mack, Executive Assistant, New Orleans Human Relations Comm'n (Mar. 3, 1997) [hereinafter Mack Interview] (on file with the *University of Michigan Journal of Law Reform*); LA. CONST. art. VI, § 5.

73. See Mack Interview, *supra*, note 72.

a civil fine or imprisonment if a party violates a consent agreement.<sup>74</sup>

Simply because a state is governed by home rule does not mean its local governments choose to adopt anti-discrimination ordinances. Kansas, for example, is a home rule state.<sup>75</sup> Local governments in Kansas can exercise their police power to protect the health, safety, and general welfare of the public.<sup>76</sup> Furthermore, "legislative intent to reserve exclusive jurisdiction to the state to regulate must be manifested clearly by statute before it can be held that the state has withdrawn from cities power to regulate the premises."<sup>77</sup>

Even under this generous home rule provision, local governments in Kansas have not been as active in regulating private employment as their state counterparts. Local governments there have not adopted extensive laws banning discrimination in private employment. As of 1993, no local government in Kansas banned discrimination in private employment based on sexual orientation.<sup>78</sup>

Thus, state governments remain the general source of power for local governments, and state governments possess the ability to restrict or enhance the amount of power given to localities.

### *B. Types of Local Anti-discrimination Ordinances*

Today many cities across the United States have enacted anti-discrimination ordinances to regulate private employment practices.<sup>79</sup> These ordinances range from virtually mirroring

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74. *See id.*

75. *See* KAN. STAT. ANN. § 19-101 (1995); *Blevins v. Hiebert*, 795 P.2d 325, 328 (Kan. 1990); *Claflin v. Walsh*, 509 P.2d 1130, 1135 (Kan. 1973) ("No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government.").

76. *See Blevins*, 795 P.2d at 328.

77. *See Claflin*, 509 P.2d at 1135; Note, *supra* note 37, at 1924 (listing no towns in Kansas with antidiscrimination ordinances). The reasons behind this failure to increase antidiscrimination protection in private employment are not entirely clear. However, the reasons probably relate to the political ideology of Kansas voters. Anti-discrimination ordinances are found frequently in large urban areas and smaller progressive "college towns," like Oakland, California and Amherst, Massachusetts. *See id.* at 1923-24. The more conservative state of Kansas and its local governments apparently may not have found political support for local anti-discrimination laws.

78. *See id.* at 1924.

79. New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, and Detroit have all adopted some type of anti-discrimination ordinance. *See id.* at 1923-25.

federal law<sup>80</sup> to protecting such characteristics as sexual orientation, source of income, educational affiliation, and marital status.<sup>81</sup>

Cities may limit their anti-discrimination protection to the protection offered by federal law. For example, the City of Durham, North Carolina, has adopted an "Employment and Public Accommodations Ordinance"<sup>82</sup> that is typical of the type of ordinance enacted by many local governments. The stated purpose of this ordinance is to "secure for all individuals within the City of Durham freedom from discrimination in connection with employment . . . because of race, color, sex, religion, national origin, disability or age."<sup>83</sup> The ordinance is not intended to "expand the authority or powers of the local enforcing agency beyond those covering any specific employer by federal laws."<sup>84</sup> The City of Durham clearly states its intent to protect only those rights already protected by federal law.

The City of Durham has charged the Durham Human Relations Commission with the responsibility of enforcing this ordinance.<sup>85</sup> After a charge is filed, the Director of the Commission appoints a staff member to investigate the matter.<sup>86</sup> The Commission makes a determination on the case by either filing a charge or dismissing the complaint.<sup>87</sup> If a complaint is filed, the Commission works to get the parties to agree to a conciliation.<sup>88</sup> If a conciliation cannot be reached, the Commission holds an administrative hearing where a hearing officer rules on the matter.<sup>89</sup> Remedies available to the Commission include requiring the offending party to hire or reinstate an

80. See *infra* notes 82-84 and accompanying text.

81. See *infra* notes 98-99 and accompanying text (discussing Ann Arbor, Michigan's broad antidiscrimination ordinance).

82. DURHAM, N.C. CODE §§ 8.6-1 to 8.6-27 (1994). Most cities and states that regulate discrimination in private employment also do so in housing and public accommodation, and sometimes in other areas, such as credit. See Note, *supra* note 37, at 1923-25 (listing city and state ordinances that ban discrimination on the basis of sexual orientation in a wide variety of contexts). The focus of this Note is on the private employment aspect of these ordinances, however, and for that reason this Note will not discuss related regulatory areas.

83. DURHAM, N.C. CODE § 8.6-1(a) (1994).

84. *Id.* § 8.6.1(b).

85. See *id.* § 8.6-15.

86. See DURHAM, N.C., HUMAN RELATIONS COMM'N, RULES AND REGULATIONS FOR ADMINISTERING CHAPTER 8.6, ARTICLES I, II, III, AND IV OF THE EMPLOYMENT AND PUBLIC ACCOMMODATIONS ORDINANCE OF THE CITY OF DURHAM § 5(A) (on file with the *University of Michigan Journal of Law Reform*).

87. See *id.* § 5(D).

88. See *id.* § 6(A).

89. See DURHAM, N.C., CODE § 8.6-19 (1994).

aggrieved party, promote the party with or without back pay, submit plans for reducing imbalances in the work place, post notices as required by the Commission, and report back to the Commission on their progress.<sup>90</sup> These remedies do not include significant financial penalties.<sup>91</sup> Any party can appeal an order to the Superior Court of Durham County.<sup>92</sup> An aggrieved party can also apply to the Superior Court to enforce an order of the Commission if there is no compliance.<sup>93</sup>

Because North Carolina is not a home rule state, the Durham City Council must apply to the state legislature whenever it wants to amend its local anti-discrimination ordinance.<sup>94</sup> This makes amendment very difficult. In 1994, the Human Relations Commission asked the state legislature to allow Durham to protect individuals from discrimination based on characteristics such as sexual orientation, marital status, pregnancy, political affiliation, personal appearance,<sup>95</sup> and educational affiliation, but the legislature rejected this expansion.<sup>96</sup>

Other local governments have enacted more expansive legislation, banning employment discrimination based upon characteristics such as sexual orientation.<sup>97</sup>

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90. See *id.* § 8.6-15.

91. See *id.*

92. See *id.* § 8.6-20.

93. See *id.* § 8.6-21.

94. See Telephone Interview with Daniel V. Love, Jr., Associate Director, Durham Human Relations Comm'n (Jan. 24, 1997) [hereinafter Love Interview] (on file with the *University of Michigan Journal of Law Reform*).

95. See Gregory Childress, *Proposal Would Prohibit Bias Based on Person's Appearance*, DURHAM HERALD-SUN, Mar. 10, 1994, at A1. Personal appearance was defined in the ordinance as "the outward appearance of any person irrespective of sex, with regard to bodily conditions or characteristics, manner or style of dress and personal grooming." *Id.* Council Member John Lloyd opposed the provision as too broad, stating: "If someone hasn't bathed or smells badly, I think that should not be a basis for a landlord to not allow that person to move into their brand new house." *Id.* Apparently this proposed amendment to the ordinance prompted the Herald-Sun to run cartoons making fun of the proposed law, showing outrageously dressed persons applying for jobs. See Love Interview, *supra* note 94.

96. See Childress, *supra* note 95.

97. A partial list of cities and counties that ban discrimination based on sexual orientation in private employment includes the following: Berkeley, California; Davis, California; Hayward, California; Laguna Beach, California; Long Beach, California; Los Angeles, California; Oakland, California; Sacramento, California; San Diego, California; San Francisco, California; Santa Monica, California; West Hollywood, California; San Mateo County, California; Aspen, Colorado; Boulder, Colorado; Denver, Colorado; Hartford, Connecticut; New Haven, Connecticut; Stamford, Connecticut; Washington, D.C.; Key West, Florida; Miami Beach, Florida; Champaign, Illinois; Chicago, Illinois; Urbana, Illinois; Ames, Iowa; Iowa City, Iowa; New Orleans, Louisiana; Portland, Maine; Baltimore, Maryland; Gaithersburg, Maryland; Rockville, Maryland; Howard County, Maryland; Montgomery County, Maryland; Amherst, Massachusetts;

The City of Ann Arbor, Michigan has an extensive local ordinance banning discrimination in employment.<sup>98</sup> The ordinance bans discrimination against any person based upon the following characteristics: "race, color, religion, national origin, sex, age, condition of pregnancy, marital status, physical limitations, source of income, family responsibilities, educational association or sexual orientation."<sup>99</sup>

Although local ordinances reflect the shared values of their communities, they have created a number of inconsistencies in enforcement from town to town and state to state, placing inconsistent demands upon employers with offices in more than one locality.

### *C. Judicial Treatment of Local Government Anti-Discrimination Ordinances*

Because states grant differing amounts of power to local governments and local governments choose to exercise that power in varying fashions, there is a wide range of local government anti-discrimination ordinances and agencies that enforce those ordinances.<sup>100</sup> Courts across the country have considered the validity of local ordinances under state law,

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Boston, Massachusetts; Cambridge, Massachusetts; Maiden, Massachusetts; Worcester, Massachusetts; Ann Arbor, Michigan; Detroit, Michigan; East Lansing, Michigan; Flint, Michigan; Marshall, Minnesota; Minneapolis, Minnesota; St. Paul, Minnesota; St. Louis, Missouri; Albany, New York; Alfred, New York; East Hampton, New York; Ithaca, New York; New York City, New York; Syracuse, New York; Watertown, New York; Tompkins County, New York; Columbus, Ohio; Yellow Springs, Ohio; Portland, Oregon; Harrisburg, Pennsylvania; Lancaster, Pennsylvania; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Austin, Texas; Alexandria, Virginia; Seattle, Washington; and Madison, Wisconsin. *See Note, supra* note 37, at 1923-25.

Many of these cities share similar qualities. First, a number of large cities, possibly with active gay rights and/or liberal organizations, have been more successful in adopting this type of legislation. *See id.* Second, a number of "college towns," potentially with active student groups and/or progressive movements, have been successful in adopting this legislation. They include, for example, the following cities: Ann Arbor, Michigan, Ithaca, New York, and Madison, Wisconsin. *See id.*

98. *See* ANN ARBOR, MICH., CODE ch. 112, §§ 9:150 to 9:164 (1995).

99. *Id.* § 9:150. Other examples of local governments actively regulating this field exist. Local governments in Colorado have gone further than the federal or state government in banning discrimination in private employment: characteristics protected by various city ordinances in Colorado include sexual orientation, military status, parenthood, custody of a minor child, and political affiliation. *See Romer v. Evans*, 517 U.S. 620, 629 (1996) (citing ASPEN, COLO., MUNICIPAL CODE § 13-98(a)(1) (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to 12-1-4 (1987); DENVER, COLO., REV. MUNICIPAL CODE, Art. IV, §§ 28-92 to 28-119 (1991)).

100. *See infra* notes 103-47 and accompanying text.

shaping the variety of local ordinances.<sup>101</sup> An examination of the case law regarding local anti-discrimination ordinances reveals that courts are divided in their treatment of these ordinances.<sup>102</sup>

Courts in several states—New York, Massachusetts, Kansas, Iowa, Wisconsin, and Arizona—expressly approve of local government anti-discrimination ordinances and agencies that do not exceed protections guaranteed by the state.<sup>103</sup> The New York Court of Appeals, in *New York State Club Association, Inc. v. City of New York*,<sup>104</sup> for example, upheld a New York City ordinance, Local Law No. 63, which prohibits discrimination in private clubs located in the city.<sup>105</sup> The New York City Human Rights Law forbids discrimination based on “race, creed, color, national origin or sex” in institutions, clubs, or places of public accommodation.<sup>106</sup> Local Law No. 63 was constructed to apply to private clubs satisfying specific criteria, rejecting the argument that these clubs are “distinctly private” and immune from regulation.<sup>107</sup> The plaintiffs in the case, private clubs in New York City, argued that Local Law No. 63 violated the home rule provision of the New York State Constitution as an invalid exercise of the City’s police power.<sup>108</sup>

The New York state constitutional home rule provision “confers broad police powers upon local government relating to the welfare of its citizens.”<sup>109</sup> Local governments in New York state may not adopt “a local law inconsistent with constitutional or general law,” and they “may not exercise [their] police

101. *See id.*

102. *See id.*

103. *See, e.g., New York State Club Ass’n, Inc. v. City of New York*, 505 N.E.2d 915 (N.Y. 1987); *Bloom v. City of Worcester*, 293 N.E.2d 268, 274–75 (Mass. 1973); *Hutchinson Human Relations Comm’n v. Midland Credit Management, Inc.*, 517 P.2d 158, 162–64 (Kan. 1973); *Dietz v. Dubuque Human Rights Comm’n*, 316 N.W.2d 859, 860 (Iowa 1982); *Federated Rural Elec. Ins. Corp. v. Madison Equal Opportunities Comm’n*, No. 79-538, 1981 Wisc. App. LEXIS 4143 (Wis. App. Apr. 27, 1981); *Kahn v. Thompson*, 916 P.2d 1124, 1127 (Ariz. Ct. App. 1995).

104. *New York State Club Ass’n, Inc. v. City of New York*, 505 N.E.2d 915 (N.Y. 1987).

105. *See id.* at 916.

106. *See id.* at 916–18 (discussing banning discrimination on the basis of characteristics also protected at the state level). The court does not appear to have considered banning discrimination based on characteristics such as sexual orientation or marital status.

107. *See id.* at 916. Although this case is more of a public accommodation case than a private employment case, the court’s analysis and holding here suggest how this court and others would rule on private employment cases based on similar facts.

108. *See id.* at 917.

109. *See id.*



power when the Legislature has restricted such an exercise by preempting the area of regulation."<sup>110</sup> Finding no inconsistencies with state law and no preemption by the state in the area of anti-discrimination, the court upheld the City's anti-discrimination law.<sup>111</sup>

Courts in four of the states surveyed have upheld local ordinances that strictly conform to state or federal law.<sup>112</sup> For example, a Worcester, Massachusetts anti-discrimination ordinance, which bans discrimination in private employment on the basis of race, color, religious creed, national origin, sex, age, and ancestry, and which creates a five-member human rights commission to enforce the ordinance has been upheld by the state's high court.<sup>113</sup> This ordinance does not provide local protection for groups not protected at the federal or state level, however.<sup>114</sup>

Courts in the other states mentioned above have allowed local governments to ban discrimination on the basis of characteristics not protected by the state or federal government.<sup>115</sup> Tucson, Arizona's employment discrimination ordinance, which bans discrimination on the basis of characteristics including sexual or affectional preference and marital status, was upheld against a constitutional challenge in state court.<sup>116</sup> As early as 1981, a state court upheld a Madison, Wisconsin ordinance which went beyond both state law and federal law in banning discrimination on the basis of marital status, source of income, less than honorable discharge, physical appearance, sexual orientation, political beliefs, and student status.<sup>117</sup>

While some states have explicitly allowed local government ordinances, other states have disallowed local ordinances en-

110. *See id.* (citing *Consolidated Edison Co. v. Town of Red Hook*, 456 N.E.2d 487 (1983); *People v. Cook*, 312 N.E.2d 452 (1974)).

111. *See id.* at 918-19, 922.

112. *See id.* at 918; *Dietz v. Dubuque Human Relations Comm'n*, 316 N.W.2d 859, 861-62 (Iowa 1982); *Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.* 517 P.2d 158, 164 (Kan. 1973); *Bloom v. City of Worcester*, 293 N.E.2d 268, 278-79, 282 (Mass. 1973).

113. *See Bloom*, 293 N.E.2d at 270.

114. *See id.* at 270, 281-85 (upholding the ordinance as a proper exercise of the city's power under the state's home rule provision as well as wholly consistent with state anti-discrimination legislation).

115. *See infra* notes 116-17 and accompanying text.

116. *See Kahn v. Thompson*, 916 P.2d 1124, 1127, 1130 (Ariz. Ct. App. 1995) (upholding the ordinance in the face of a freedom of association argument).

117. *See Federated Rural Elec. Ins. Corp. v. Madison Equal Opportunities Comm'n*, No. 79-538, 1981 Wis. App. LEXIS 4143, at \*1-\*2, \*9 (Wis. App. Apr. 27, 1981).

tirely or have limited their application.<sup>118</sup> Two of the states mentioned above would not allow local governments to create local human rights commissions. In 1990, the Supreme Court of Missouri held that state law did not allow the Mayor's Commission on Human Rights of Springfield, Missouri to find an employee was terminated unlawfully after the employee filed a claim under local anti-discrimination law.<sup>119</sup> Similarly, the Connecticut Supreme Court held that municipalities cannot establish equal rights commissions to enforce local employment laws.<sup>120</sup>

Courts in four of the states mentioned above found local anti-discrimination ordinances invalid because they either went beyond the limits of state law or regulated areas preempted by state law:<sup>121</sup> at issue in *McCrory Corp. v. Fowler*<sup>122</sup> was a Montgomery County ordinance making it "an unlawful employment practice for an employer to discriminate against any individual because of the individual's race, color, religious creed, ancestry, national origin, age, sex, marital status, handicap, or sexual orientation."<sup>123</sup> Maryland is a home rule state, and under the state constitution, counties can choose to adopt a home rule charter to achieve a significant degree of political self-determination.<sup>124</sup> In *McCrory*, however, the Maryland Court of Appeals invalidated the County ordinance as not a matter of "local law" under the Maryland home rule provision.<sup>125</sup> The ordinance authorized a private citizen to seek redress for another private citizen's violation of the anti-employment discrimination ordinance by instituting a judicial action in the state courts.<sup>126</sup> Because the judicial action authorized by the ordinance was effectively independent of any county administrative proceeding, the court found that the ordinance attempted to operate within an area reserved solely

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118. See *infra* notes 119-22, 131-40 and accompanying text.

119. See *Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights*, 791 S.W.2d 382, 386-87 (Mo. 1990).

120. See *New Haven Comm'n on Equal Opportunities ex rel. Washington v. Yale Univ.*, 439 A.2d 404, 406 (Conn. 1981).

121. For example, an Illinois appellate court has held that state law preempts local law in the employment area, and that local governments are not allowed to broaden the scope of state law through local ordinances. See *Hutchcraft Van Serv., Inc. v. City of Urbana Human Relations Comm'n*, 433 N.E.2d 329, 333-34 (Ill. App. Ct. 1982).

122. 570 A.2d 834 (Md. 1990).

123. *Id.* at 835.

124. See MD. CONST. art. XI-A, § 1.

125. See *McCrory*, 570 A.2d at 840.

126. See *id.* at 837.

for the State.<sup>127</sup> Therefore, the ordinance, aimed at combating employment discrimination by creating a new private judicial cause of action, was not a valid local law under the state constitution.<sup>128</sup>

The Maryland Court of Appeals appeared to be concerned with a local government creating a cause of action enforceable outside the boundaries of the local government.<sup>129</sup> Today, many local governments have created their own agencies for enforcing local anti-discrimination ordinances.<sup>130</sup> Since most local government anti-discrimination agencies use litigation in state courts as an alternative to handling discrimination complaints internally, however, the court might still invalidate this type of arrangement, citing *McCrory* as persuasive.

Similarly, a Minnesota appellate court invalidated a Minneapolis ordinance granting health care benefits to same-sex couples. In *Lilly v. City of Minneapolis*, a city resident and taxpayer challenged a Minneapolis ordinance providing reimbursement to city employees for health care insurance costs for same-sex domestic partners and for blood relatives not defined as "dependents," benefits that were not authorized under state law.<sup>131</sup> Minnesota is a home rule state, and the City of Minneapolis argued that its ordinance was valid as a matter of municipal concern and did not conflict with state law.<sup>132</sup> The Minnesota court considered the issue of benefits to same sex partners a statewide matter, however, and refused to give the local government much deference.<sup>133</sup> "If a matter presents a

127. See *id.* at 837-40.

128. See *id.* at 840.

129. The court cited many sources lending credence to its concern. For example, the court cites 6 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 22.01 (3d ed. 1988) ("The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves. Under the rule, an ordinance cannot directly create a civil liability of one citizen to another or relieve one citizen from liability by imposing it on another."). See *McCrory*, 570 A.2d at 839.

130. For example, the Baltimore Community Relations Commission enforces the anti-discrimination ordinance enacted by the city of Baltimore, MD. See Telephone Interview with a Mr. Kimball, Representative of the Baltimore Community Relations Comm'n (Feb. 24, 1997) [hereinafter Kimball Interview] (on file with the *University of Michigan Journal of Law Reform*).

131. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 108 (Minn. Ct. App. 1995). This case only dealt with public employees of Minneapolis and did not discuss the issue of regulating private employment. See *id.*

132. See *id.* at 111. For support, the City cited *State ex rel. Lowell v. City of Crookston*, 91 N.W.2d 81, 83 (Minn. 1958) ("In matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld."). See *id.*

133. See *id.*

statewide problem, the implied necessary powers of a municipality to regulate are narrowly construed unless the legislature has expressly provided otherwise."<sup>134</sup> The court found this to be a statewide issue because the legislature had recently considered and rejected awarding benefits to same-sex partners.<sup>135</sup> After narrowly construing the powers of the City of Minneapolis to regulate this area, the court held that the City's ordinance was beyond the power granted under home rule, and was thus without legal force.<sup>136</sup>

Like the Minnesota appellate court, a California appellate court found that a local government ordinance in California improperly interfered with a statewide matter. In *Delaney v. Superior Fast Freight*, the California Court of Appeals held that a Los Angeles ordinance banning discrimination in private employment on the basis of sexual orientation was preempted by state law.<sup>137</sup> Discrimination in private employment was outlawed by sections 1101 and 1102 of the California Labor Code.<sup>138</sup> The court held that state regulation in this field preempted local governments from doing the same, "[e]ven assuming a city is legally capable of creating a right of action between third persons by ordinance."<sup>139</sup> The California Supreme Court denied review of the intermediate appellate court's decision, giving the decision statewide precedential effect.<sup>140</sup>

Finally, one state court sent mixed signals regarding this issue. An Atlanta city ordinance banning discrimination in public employment was upheld by the Supreme Court of Georgia.<sup>141</sup> In *City of Atlanta v. McKinney*, a state representative, city council members, city employees, and a taxpayer sought declaration that a city ordinance prohibiting discrimination on

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134. *Id.* (quoting *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984)).

135. *See id.* at 112-13.

136. *See id.* at 113.

137. *See Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 36-37 (Cal. Ct. App. 1993).

138. *See id.* at 35-36. California is one of the few states that ban discrimination on the basis of sexual orientation. *See supra* note 38.

139. *Delaney*, 18 Cal. Rptr. 2d at 36. This language seems to indicate that the court is not completely comfortable with the notion that local governments can adopt ordinances of this nature in the first place. The court was also concerned that adopting these kinds of local ordinances would impose unreasonable hardships on employers who do business in more than one city. *See id.* at 37. This point will be examined further in the next section of this Note. *See discussion infra* Part II.E.

140. *See* Arthur S. Leonard, *California Courts Limit Laws on Sexual Orientation Bias*, EMPL. TESTING-L. & POL'Y REP., Sept. 1993, at 145, 145-49.

141. *See City of Atlanta v. McKinney*, 454 S.E.2d 517, 522 (Ga. 1995).

the basis of sexual orientation in city employment, events, and vendors was invalid under state law.<sup>142</sup> The court began by stating: "Under its police power, a city may enact ordinances to protect the health, safety and general welfare of the public."<sup>143</sup> The court found that this power "enables the city to prohibit discrimination on the basis of race, color, national origin, religion, sex, and sexual orientation as part of its regulation of city employment, events, and vendors."<sup>144</sup> While granting the City of Atlanta the freedom to regulate public employment, the court specifically noted that "[t]he challenged ordinances do not purport to regulate private employers or public employers other than the City of Atlanta."<sup>145</sup> The court based its holding on the fact that "the anti-discrimination ordinances extend only to the city's policies governing its employees and property and to those businesses that state law leaves to the city to regulate."<sup>146</sup> This language suggests that the court might, in a future decision, find a local government anti-discrimination ordinance invalid under state law if the ordinance banned discrimination on the basis of sexual orientation or another characteristic not protected by federal or state law.<sup>147</sup>

State courts that have ruled on the validity of local ordinances have reached differing conclusions as a result of the variations in state law and in local ordinances.<sup>148</sup> This is a significant departure from the largely uniform system developed under federal law.<sup>149</sup>

#### *D. Local Anti-Discrimination Ordinances in Practice*

In an attempt to do a fair survey I performed a small survey of local government agencies to measure the effectiveness of local ordinances. I chose cities based on their geography and

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142. See McKinney, 454 S.E.2d at 519.

143. *Id.* at 521 (citing *H & H Operations v. City of Peachtree City*, 283 S.E.2d 867 (Ga. 1981)).

144. *Id.*

145. *Id.*

146. *Id.* at 522.

147. The sexual orientation component of the city ordinance was the subject of the challenge in this suit. See *id.* at 519. The court's language suggests that it would not allow a local government to ban discrimination on the basis of sexual orientation in private employment. See *supra* note 145 and accompanying text.

148. See *supra* text accompanying notes 103-47.

149. See discussion *supra* Part I.A.

size. All areas of the country are represented, including the East (Philadelphia, Baltimore), the South (Tampa, New Orleans), the Midwest (Chicago, Detroit, Ann Arbor, Columbus) and the West (West Hollywood, Seattle).<sup>150</sup>

*1. Numbers of Complaints Filed Under Local Government Ordinances*—Chicago has an extensive anti-discrimination law that extends further than federal law by banning discrimination in private employment on the basis of ancestry, sexual orientation, marital status, military discharge, and source of income.<sup>151</sup> Complaints arising in Chicago based on ancestry, military status, or marital status can also be brought under Illinois law through the Illinois Department of Human Rights.<sup>152</sup> Between 1993 and 1995 the total number of complaints based on these five characteristics (sexual orientation, marital status, military discharge, source of income, and ancestry) never totalled more than thirteen percent of the total number of complaints filed with the Commission.<sup>153</sup> The majority of these complaints were brought for sexual orientation discrimination, averaging about seven percent of the total

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150. The goal of the survey was to encompass numerous localities and different types of ordinances to make the results meaningful. Due to the small number of complaints that are typically filed under these types of ordinances, see Table 1, my preference was for larger cities. Initially, I contacted a number of local government anti-discrimination/fair employment offices and conducted phone interviews with representatives from those offices. I questioned the representatives on a number of issues regarding their ordinances, especially focusing on the impact that the ordinances are having. I also asked each office to send me any information it had compiled during the last three years on the number of complaints brought under each characteristic protected in the locality, including both the number of each type of complaint and the percentage that each type of complaint made up of the total complaints. Each agency had its own unique system of compilation. The results of this survey can be found in Table I at the conclusion of this Note.

151. See CHICAGO, ILL., CODE § 2-160-030 (1990). The Chicago law differs from federal law in many other ways. For example, under federal law, a complaint can only be filed for Title VII and ADA claims against an employer who employs at least 15 employees. See 42 U.S.C. § 2000(e)(b); 42 U.S.C. § 12111(5)(A). For suits brought under the ADEA, the minimum number is 20 employees. See 29 U.S.C. § 630(b). Chicago law does not require a minimum number of employees for employer liability, however. See Telephone Interview with Kathryn M. Hartrick, Director of Human Rights Compliance, City of Chicago Commission on Human Relations (Feb. 26, 1997) [hereinafter Hartrick Interview] (on file with the *University of Michigan Journal of Law Reform*).

152. See COMM'N ON HUMAN RIGHTS, COOK COUNTY (ILL.), WHERE TO FILE EMPLOYMENT DISCRIMINATION CLAIMS (1996) (on file with the *University of Michigan Journal of Law Reform*). The City of Chicago Commission on Human Relations published a biennial report for 1993/1994 and compiled statistics from the Adjudication Division for 1995. The findings are listed in Table 1. See COMM'N ON HUMAN RELATIONS, CITY OF CHICAGO, BIENNIAL REPORT 1993/1994 (1995); COMM'N ON HUMAN RELATIONS, CITY OF CHICAGO, ADJUDICATION DIVISION 1995 STATISTICS (1996).

153. See *infra* Table 1.

number of complaints filed each year.<sup>154</sup> No more than one complaint was brought each year on the basis of military discharge, or source of income.<sup>155</sup> The largest number of complaints were brought alleging race or sex discrimination,<sup>156</sup> even though such complaints also can be brought through the EEOC or Illinois Department of Human Rights.<sup>157</sup>

Victims alleging employment discrimination in Cook County, including in Chicago, may also file complaints against employers under Cook County ordinances which are enforced by the Cook County Commission on Human Rights.<sup>158</sup> Cook County also bans discrimination on the basis of ancestry, marital status, military discharge, source of income and sexual orientation, along with characteristics protected by both the State of Illinois and the City of Chicago.<sup>159</sup>

Like Chicago, other local government human rights offices reported a very small number of complaints based on characteristics not protected by other levels of government.<sup>160</sup> The Tampa Human Relations Board is charged with enforcing the local human rights ordinance.<sup>161</sup> Tampa's ordinance bans discrimination by private employers on characteristics which

154. *See id.*

155. *See id.*

156. *See id.*

157. *See* 42 U.S.C. §§ 2000e, 2000e-2(a) to (d), 2000e-4 (1994 & Supp. 1997); 775 ILL. COMP. STAT. 5/7A-102 (West 1997).

158. COOK COUNTY, ILL., HUMAN RIGHTS ORDINANCE § X(B)-(E) (1993) (on file with the *University of Michigan Journal of Law Reform*).

159. *See id.* §§ I, II(S). While complainants in Chicago do have these options available to them, Robert Horowitz, an Investigator with the Cook County Commission on Human Rights, explained that the Cook County Commission does not usually accept complaints from the City of Chicago. Exceptions are made in cases where the Chicago ordinance does not cover certain discriminatory activity which is outlawed by Cook County. *See* Telephone Interview with Robert Horowitz, Investigator, Cook County Commission on Human Rights (Feb. 26, 1997) [hereinafter Horowitz Interview] (on file with the *University of Michigan Journal of Law Reform*). For example, Horowitz said that if an employee has a retaliation complaint against an employer in Chicago, Chicago law requires that the employee file a formal complaint with an employer. *See id.* Cook County does not require that a formal complaint be filed, however, but requires that the employee complain in some fashion to his or her employer. *See id.* Cook County also has more remedies available than Chicago does for employment violations. *Compare* CHICAGO, ILL., CODE § 2-6-120 (1990) (providing only a \$100-500 per day fine for employment discrimination) *with* COOK COUNTY, ILL., HUMAN RIGHTS ORDINANCE § X(C)-(D) (March 16, 1993) (providing a large number of equitable remedies as well as a \$100-\$500 per day fine and an individual right of action for employment discrimination).

160. *See infra* notes 164-66, 168-75, 178-85, 188 and accompanying text.

161. TAMPA, FLA., CODE § 12.5 (1993).

include sexual orientation and marital status.<sup>162</sup> Despite the publicity generated during the adoption, repeal, and subsequent re-adoption of this ordinance,<sup>163</sup> the number of complaints brought to the Office of Human Rights has been small: from October, 1995 to October, 1996, no marital status complaints and only one sexual orientation complaint were brought against private employers.<sup>164</sup> A similar number of complaints were reported the following year.<sup>165</sup> The sexual orientation complaints represent only one to two percent of the total number of complaints received by the Tampa Office of Human Rights, and the marital status complaints traditionally are even smaller in proportion.<sup>166</sup>

Likewise, few claims have been pursued under the New Orleans ordinance. New Orleans adopted an anti-discrimination ordinance in 1992 that bans discrimination in employment on the basis of sexual orientation and marital status, in addition to federally-protected characteristics.<sup>167</sup> The New Orleans Human Relations Commission, the agency charged with enforcing the city ordinance, reported that in years 1992-1996, the number of complaints filed with the Commission stating sexual orientation as the basis for discrimination in employment totaled only sixteen.<sup>168</sup> The sexual orientation complaints

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162. See TAMPA, FLA., CODE § 12.26 (1993); Booth Gunter, *Gay Rights Divide Communities: The Issue Stirs Emotions as It Finds Its Way onto Ballots Across the Nation*, TAMPA TRIB., Mar. 13, 1995, at 1.

163. The ordinance was originally adopted in 1991. See Gunter, *supra* note 162, at 1. In 1992, Tampa voters approved a repeal amendment. See *id.* This amendment was later overturned in court. See *id.* In 1995, a repeal initiative was struck from the ballot by a state judge at the last minute. See *id.*

164. See Table 1; Letter from Charles F. Hearn, Administrator, City of Tampa Office of Human Rights/Community Services to Chad A. Readler (Feb. 24, 1997) [hereinafter Hearn Letter] (on file with the *University of Michigan Journal of Law Reform*).

165. See Table 1; Hearn Letter, *supra* note 164.

166. See Telephone Interview with Charles F. (Fred) Hearn, Administrator, City of Tampa Office of Human Rights/Community Services [hereinafter Hearn Interview] (on file with the *University of Michigan Journal of Law Reform*) (Feb. 20, 1997). For a city the size of Tampa, these numbers seem very small. See *id.* However, if a discrimination complaint does result in a civil trial, the city attorney's office will get involved on behalf of the complaining party if the complaining party cannot afford an attorney, if a pattern of discrimination by a private employer is shown, or if it is in the city's best interest. See *id.*; Telephone Interview with Roberto Ruello, Assistant City Attorney, Tampa City Attorney's Office (Feb. 20, 1997) [hereinafter Ruello Interview] (on file with the *University of Michigan Journal of Law Reform*).

167. See NEW ORLEANS, LA., CODE § 86-132(2) (1992); Mack Interview, *supra* note 72.

168. See HUMAN RELATIONS COMM'N, CITY OF NEW ORLEANS, 1996 ANNUAL REPORT: BREAKING BARRIERS—BUILDING COMMUNICATION 9 (1996) (on file with the *University of Michigan Journal of Law Reform*).



represented between seven and twenty-four percent of the total employment discrimination complaints filed with the Commission during each year.<sup>169</sup>

Detroit's new anti-discrimination office, the City of Detroit Human Rights Department, also reported a small number of complaints filed with its Department.<sup>170</sup> From the Department's re-establishment in January 1996 until March 1997, only sixty complaints were filed.<sup>171</sup> Only five listed sexual orientation and zero listed marital status as the basis of discrimination.<sup>172</sup>

The municipal code for the college town of Ann Arbor, Michigan contains an extensive anti-discrimination ordinance banning discrimination on the basis of thirteen different characteristics.<sup>173</sup> The Ann Arbor Human Rights Division has received fewer than fifteen complaints per year of employment discrimination based upon marital status, source of income, educational association, and sexual orientation.<sup>174</sup> The majority of complaints were brought for sexual orientation discrimination, three to four for source of income discrimination, and zero to two for educational association and marital status discrimination.<sup>175</sup> When possible, the Ann Arbor Human Rights Division refers complaints to the State of Michigan Equal Employment Office. As of December, 1996, the Division is authorized to impose significant financial penalties against offenders, including back pay, lost wages, and punitive damages.<sup>176</sup>

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169. See *id.*; Table 1. The percentage of complaints brought on the basis of sexual orientation discrimination as compared to the total number of complaints filed decreased over the years 1992 to 1996 as a result of large increases in the number of complaints filed on the basis of other characteristics, especially race. See HUMAN RELATIONS COMM'N, CITY OF NEW ORLEANS, *supra* note 168, at 9.

170. See Telephone Interview with Michael Daisy, Staff Investigator, Detroit Human Rights Dep't (Mar. 4, 1997) [hereinafter Daisy Interview] (on file with the *University of Michigan Journal of Law Reform*).

171. See Letter from Michael Daisy, Staff Investigator, Detroit Human Rights Department, to Chad A. Readler (Mar. 17, 1997) [hereinafter Daisy Letter] (on file with the *University of Michigan Journal of Law Reform*).

172. See *id.*

173. See ANN ARBOR, MICH., CODE ch. 112, § 9:150 (1995).

174. See Telephone Interview with Raymond Chauncey, City of Ann Arbor Human Rights Division (Feb. 18, 1997) [hereinafter Chauncey Interview] (on file with the *University of Michigan Journal of Law Reform*).

175. See *id.*

176. See *id.* The maximum fine that could be imposed against private employers was \$500 prior to December, 1996. The legality of this latest authorization of power to the Division still could be challenged in court. See *id.*

West Hollywood, California is a small city that has outlawed discrimination in private employment on the basis of characteristics including sexual orientation and HIV/AIDS infection.<sup>177</sup> In the last few years, only ten employment discrimination cases were filed with the city.<sup>178</sup> No complaints filed under the city ordinance have ever been turned over to the City Attorney's office.<sup>179</sup> Employees turn instead to dispute resolution or other measures to resolve their employment problems.<sup>180</sup> The complainants that have a strong case usually do not use the city legal department but instead file with the state anti-discrimination agency.<sup>181</sup>

A minority of local governments have received a greater number of complaints based on sexual orientation discrimination in employment. The city of Philadelphia, whose code bans such discrimination,<sup>182</sup> is one of them. Twenty-seven complaints were filed with the Philadelphia Commission on Human Relations (the "Commission") on the basis of sexual orientation discrimination, representing eleven percent of the total number of complaints filed with the Commission.<sup>183</sup> In 1996, seventeen sexual orientation discrimination complaints were filed, representing four percent of the total number of complaints filed with the Commission.<sup>184</sup>

In contrast, approximately fifty percent of the complaints filed with the City of Columbus Community Relations Commission claimed sexual orientation discrimination.<sup>185</sup> Columbus adopted its original anti-discrimination ordinance in 1984, added sexual orientation in 1992, created the

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177. See WEST HOLLYWOOD, CAL., CODE art. IV, ch. II, §§ 4200-4203, 4270-4272 (1984).

178. See Telephone Interview with Corey Roskin, Acting Chair, Social Services, City of West Hollywood (Feb. 12, 1997) [hereinafter Roskin Interview] (on file with the *University of Michigan Journal of Law Reform*).

179. See *id.*

180. See *id.*

181. See *id.* The only case that went through the city's legal channels was a complaint by an HIV-infected man who was refused service at a nail salon.

182. See PHILADELPHIA, PA., CODE § 9-1103 (1982).

183. See COMM'N ON HUMAN RELATIONS, CITY OF PHILADELPHIA, BUILDING BRIDGES: THE 1995-96 ANNUAL REPORT 9 (1996) [hereinafter PHILADELPHIA ANNUAL REPORT]; tbl. 1. Some complaints name more than one basis for the alleged discriminatory act, so the Commission's percentages add up to greater than 100%.

184. See COMM'N ON HUMAN RELATIONS, CITY OF PHILADELPHIA SUMMARY OF RECEIVED CASES (Mar. 3, 1997) (on file with the *University of Michigan Journal of Law Reform*); Table 1.

185. See Telephone Interview with Ruth Jaworski, Equal Opportunity Officer for the City of Columbus Community Relations Commission (March 3, 1997) [hereinafter Jaworski Interview] (on file with the *University of Michigan Journal of Law Reform*).

Community Relations Commission in 1992, and staffed the Commission in 1994.<sup>186</sup> Prior to 1994, complaints had to be filed with the City Attorney's Office.<sup>187</sup> Today, the Commission refers some serious cases to the City Attorney if not settled, but, as of yet, no one has been criminally prosecuted under the statute.<sup>188</sup>

2. *Awareness of Local Ordinances*—Kathryn Hartrick, Director of Compliance for the City of Chicago Commission on Human Relations, believes that employers are much less aware of local anti-discrimination laws than federal and state laws.<sup>189</sup> She suggests that private employers frequently become aware of local law only after attending an employment law seminar.<sup>190</sup> Many attorneys who practice in this area are either unfamiliar with local law or tend to ignore it when discussing employment law issues.<sup>191</sup> The focus is often on federal law.<sup>192</sup>

Fred Hearn, Administrator for the City of Tampa Office of Human Rights, agrees that private employers are frequently unaware of the city's law.<sup>193</sup> Unless an employer has been investigated by the city or had a complaint filed against them with the city, the employer is probably not aware of Tampa law, says Hearn, unless the employer has been involved in some special anti-discrimination training program.<sup>194</sup>

The situation may be slightly different in Philadelphia. The Philadelphia ordinance banning sexual orientation discrimination has been in effect since 1982.<sup>195</sup> Jack Fingerman, Director of Public Information for the Philadelphia Commission on Human Relations, believes that most private employers are currently in compliance with Philadelphia law.<sup>196</sup>

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186. See Chauncey Interview, *supra* note 174.

187. See *id.*

188. See *id.*

189. See Hartrick Interview, *supra* note 151.

190. See *id.*

191. See *id.*

192. See *id.* For example, an attorney might say in one of these situations mentioned above that "there is no individual liability for sexual harassment," or something of that nature, when really there can be individual liability under state and local law. *Id.*

193. See Hearn Interview, *supra* note 166. Hearn suggests that employers do not take local law into account like they do federal and state law in devising their employment practices. *Id.*

194. See *id.*

195. See Telephone Interview with Jack Fingerman, Director of Public Information, Philadelphia Comm'n on Human Relations (Feb. 20, 1997) [hereinafter Fingerman Interview] (on file with the *University of Michigan Journal of Law Reform*).

196. See *id.*

Baltimore, which bans discrimination in employment on the basis of characteristics including sexual orientation and marital status,<sup>197</sup> has had some success in increasing public awareness of its local anti-discrimination ordinance. A representative from the Baltimore Community Relations Commission which enforces the Baltimore anti-discrimination ordinance,<sup>198</sup> says that the Commission has local meetings to help inform both public and private employers about the local law and the functions of the Commission.<sup>199</sup> Employers often call the Commission and request materials, a good indication that information regarding Baltimore law is reaching citizens and businesses.<sup>200</sup>

Likewise, since the New Orleans Human Relations Commission opened in 1992, Dorinda Mack, the Commission's Executive Assistant, has seen the public's awareness of the Commission and its duties steadily increase.<sup>201</sup> Still, the Commission does not get much publicity in the New Orleans community.<sup>202</sup> The EEOC, the state human rights office, and the Fair Housing Commission often refer people to the Commission if they have complaints involving sexual orientation discrimination, which is only regulated at the local level.<sup>203</sup> The Commission has increased its efforts to inform both the public and private employers through town hall meetings.<sup>204</sup> Mack attributes the relatively small number of sexual orientation complaints to the lack of familiarity with the Commission within the gay and lesbian community.<sup>205</sup> No sexual orientation discrimination complaints have been filed against large businesses. Major cases which are filed initially with the Commission are turned over to the EEOC.<sup>206</sup>

Other local fair employment agencies have had trouble spreading awareness regarding local anti-discrimination laws. Michael Daisy of the City of Detroit Human Rights Department

197. See BALTIMORE, MD., CODE art. 4, § 10 (1990).

198. See *id.* §§ 15-16 (1990).

199. See Kimball Interview, *supra* note 130.

200. See *id.*

201. See Mack Interview, *supra* note 72.

202. See *id.*

203. See *id.*

204. See *id.*

205. See *id.* This also may be attributable to the fact that larger employers are more likely to be familiar with the Commission and the serious penalties that can be imposed for violation of local law, including civil fines and possible imprisonment for breach of a consent decree. *Id.*

206. See *id.*

said that no violations with the Department were filed between 1990 and January 1996.<sup>207</sup> As a result of budget and staffing cutbacks, only one or two volunteers handled investigations for the Department, the quality of work was poor, and complaint activity was sporadic.<sup>208</sup> This dry spell may have contributed to employers' and potential complainants' lack of awareness about local law and the re-established Department's existence.<sup>209</sup>

Local anti-discrimination laws may have some deterrent effect, says Raymond Chauncey of the Ann Arbor Human Rights Division.<sup>210</sup> The laws are effective once the Division or a disgruntled employee notifies an employer of them. Chauncey related a story about a gay employee at an Ann Arbor company who was being harassed by a co-worker because of his sexual orientation. The employee contacted the Division simply to inquire about his rights under local law.<sup>211</sup> Upon learning his rights, the employee confronted his employer about the treatment he was receiving at work and explained his right to file a complaint with the Human Rights Division.<sup>212</sup> The employer promoted the complaining employee and transferred the offending co-worker.<sup>213</sup> The Ann Arbor anti-discrimination laws may be used best as a threat or a last resort to encourage private employers to comply. As in many cities, informing private employers of local law before a complaint is filed or is on the verge of being filed is still uncommon.

The passage of the Columbus ordinance was controversial and drew lots of media and public attention. Since its passage, however, only a small number of private employers in Columbus have independently changed their company policies.<sup>214</sup> Most companies have changed their policies only after a complaint has been filed against them.<sup>215</sup>

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207. See Daisy Letter, *supra* note 171.

208. See *id.*

209. See Daisy Interview, *supra* note 170.

210. See Chauncey Interview, *supra* note 174.

211. See *id.*

212. See *id.*

213. See *id.* Chauncey noted that the company did not want to face protests like those directed against the Cracker Barrel restaurant chain. Criticism was directed at Cracker Barrel when it announced in 1991 that the company would fire employees who did not exhibit "normal heterosexual values." Ruth Ann Leach, *Movie Should Shame Cracker Barrel Officials*, NASHVILLE BANNER, Jan. 23, 1997, at A7.

214. See Jaworski Interview, *supra* note 185.

215. See *id.*

3. *Resource and Staff Concerns of Local Government Human Rights Agencies*—Many commissions are less effective than they could be because they lack the resources necessary to adequately enforce the ordinances. They often employ three or fewer investigators.<sup>216</sup> A report by the Glass Ceiling Commission, a pro-affirmative action corporate leadership group consisting of business, legal, and political leaders, supports local government leadership in helping women and minorities advance in the business world but acknowledges that government agencies “must have the funding and the tools necessary for the job.”<sup>217</sup> The Glass Ceiling Commission recognizes that passing anti-discrimination laws has little practical effect when adequate resources are not allocated to enforce them.<sup>218</sup> Local government human rights commissions lack necessary resources, and as a result, their anti-discrimination ordinances are largely ceremonial.<sup>219</sup>

#### *E. Effects of Local Anti-Discrimination Ordinances*

As local ordinances and agencies grow in number, private employers may be hit by inconsistent regulations from numerous jurisdictions. For example, a private employer may have to comply with city, county, state, and federal employment laws.<sup>220</sup>

Overlapping regulations by different agencies cause problems for both private employers and the agencies themselves. Administratively and economically it may be more advantageous for cities to have one agency with greater power to regulate this area. Durham, North Carolina County Commissioner Ellen Reckhow questioned, “[w]hy should we spend local money to do something that another level of

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216. *See id.*

217. *Excerpts of Glass Ceiling Commission Report: A Solid Investment: Making Full Use of the Nation's Human Capital*, Daily Lab. Rep. (BNA) No. 226, at E-1 (Nov. 24, 1995).

218. *See id.* at E-8

219. *See supra* notes 207–08 and accompanying text.

220. *See also* SEATTLE, WASH., ORDINANCE 118392 (Jan. 1, 1997) (abolishing separate departments with overlapping functions). For example, Seattle had multiple local agencies enforcing anti-discrimination laws in private employment until 1997 when it combined the Human Rights Department and the Office for Women's Rights into the City of Seattle Office for Civil Rights, charged with enforcing Seattle's anti-discrimination laws in areas including private employment.

government is already enforcing, when we can barely deal with the services we have to provide? I'm trying to keep the tax rate down."<sup>221</sup>

In addition, employers often must conform to inconsistent regulations. Many medium and large private employers have offices in many localities, each with their own uniquely crafted local ordinances. For example, employers in Oregon must reconcile a Portland ordinance banning discrimination in private employment on the basis of sexual orientation, and twenty-seven smaller Oregon communities' own individual ordinances, all of which prohibit extending protected class status to homosexuals in employment.<sup>222</sup>

A California court discussed the problems these conflicts can create for private employers in *Delaney v. Superior Fast Freight*.<sup>223</sup> Holding that a Los Angeles ban of discrimination based on sexual orientation was preempted by state law, the court stated, "We can envision numerous local employment discrimination measures which would impose unreasonable hardship, especially on companies doing business across local borders, particularly in areas such as Los Angeles County which is compromised of over 80 cities."<sup>224</sup> California, because it encompasses many local governments that have adopted anti-discrimination ordinances, is a prime example of how conflicting local laws can cause "unreasonable hardships" for private employers.

When faced with inconsistent legislation, employers have three choices: (1) ignore all anti-discrimination laws completely and deal with the consequences; (2) tailor each local office to the individual requirements put upon them by local governing bodies; or (3) uniformly change all employment practices to meet the requirements of the most stringent local government in which the employer operates.

Faced with the likelihood of increased expenses in attempting to meet inconsistent local regulations, private employers may choose to ignore individual local laws entirely. With

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221. James Eli Shiffer, *Commissioners Back Countywide Anti-Bias Measure*, RALEIGH (N.C.) NEWS & OBSERVER, Feb. 13, 1997, at B1, available in 1997 WL 7822451.

222. See *Oregon Court Upholds State Law Banning Local Anti-Gay Ordinances*, Daily Lab. Rep. (BNA) 72, at A-7 (Apr. 14, 1995). Though *Romer v. Evans* held that states cannot adopt laws prohibiting an extension of rights to homosexuals, at least one circuit has allowed an extension by local governments. See discussion *infra* note 229.

223. *Delaney*, 18 Cal. Rptr. 2d at 36.

224. *Id.* at 37.

knowledge that local human rights agencies provide only limited remedies to complainants, employers may take their chances.

Otherwise, employers which require each of their local offices to comply with the relevant local regulations may have to allocate resources for researching applicable local anti-discrimination laws, implementing appropriate hiring and employment practices, and training local managers and human resource personnel to operate under these regulations. Large employers may be better suited to absorb such cost than medium and small employers, with offices in a few localities. Small employers may be less able to absorb such costs and less adept at implementing and tailoring practices to individual requirements. Those who believe that local governments are best suited to act in a limited capacity by collecting taxes and providing limited local services are troubled by the thought of local governments regulating private employers in this manner and forcing these costs on them.<sup>225</sup>

Private employers which desire to meet local regulations while avoiding high costs may have to change their employment policies uniformly to comply with the more stringent local government ordinances. A uniform policy is more efficient than tailoring individual offices to local requirements. As a result, local ordinances from certain localities have extraterritorial effects, forcing employers to change their practices everywhere, not just in localities which provide additional protections. Justice Rehnquist observed, "[t]he imaginary line defining a city's corporate limits cannot corral the influence of municipal actions. A city's decisions inescapably affect individuals living immediately outside its borders."<sup>226</sup> Spillover effects undermine democratic and efficiency arguments in favor of local control. Local governments with the most stringent laws force those laws on other localities by causing employers to change their policies company-wide.

The Columbus Community Relations Commission has found that some private employers are changing their employment policies company-wide to conform with the increasing demands of local law.<sup>227</sup> For example, more private employers

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225. See, e.g., ROBERT H. CONNERY, *GOVERNING THE CITY* 1, 5-6 (Robert H. Connery & Demetrios Caraley eds., 1969) (concluding that local governments' limited financial resources prevent them from effectively providing more than limited services).

226. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978).

227. See Jaworski Interview, *supra* note 185.



recognize and give benefits to domestic partners company-wide as more local ordinances require them.<sup>228</sup> As more cities pass ordinances banning discrimination on the basis of characteristics such as sexual orientation, marital status, source of income, and military status, companies will have to adopt uniform policies company-wide simply to meet the requirements of the most stringent local law applicable to any of their offices. An employer having offices in both Columbus, where homosexuals are granted protected status, and Cincinnati, where such protected status is barred, would be faced with two directly contrasting directives from the respective local governments. Employers may enact separate employment practices in the two localities, but given the costs this option could impose, employers may well choose to uniformly adopt the more restrictive policy, thereby giving the Columbus ordinance extra-territorial effect and indirectly overriding the will of the people of Cincinnati.

Moreover, the United States Court of Appeals for the Sixth Circuit held that a Cincinnati city charter amendment that removed homosexuals from protection under municipal anti-discrimination ordinances and precluded restoring them to protected status was constitutionally permissible.<sup>229</sup> *Equality Foundation* was decided subsequent to the Supreme Court's decision in *Romer v. Evans*, where the Supreme Court struck down a statewide ballot initiative barring local governments in Colorado from passing legislation granting homosexuals protection from discrimination in, among other areas, private employment. Thus, under the holding in *Equality Foundation*, local governments within the Sixth Circuit's reach are empowered to adopt laws authorizing that no special protections in private employment be granted to homosexuals.

As some local governments' laws are applied extraterritorially, other local governments lose the ability to enforce their own laws. Local governments lose their ability to make their own cultural and political choices, a devastating loss for local governments which are often hailed for their ability to respond to unique local concerns.<sup>230</sup>

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228. *Id.*

229. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d at 289, 301 (6th Cir. 1997); *Romer v. Evans*, 517 U.S. 620 (1996).

230. See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861), reprinted in *UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT*, 170, 350 (H.B. Acton ed. 1972).

### III. THE FEDERAL GOVERNMENT IS THE BEST GOVERNMENTAL BODY TO REGULATE DISCRIMINATION IN PRIVATE EMPLOYMENT

Local governments are not the appropriate body to regulate private employment. Local human rights commissions, unlike the EEOC, have limited powers and remedies available to complaining parties.<sup>231</sup> The federal government can most capably regulate such discrimination.<sup>232</sup> Strengthening federal law is the most appropriate way to eliminate discrimination in the workplace.

Politicians who have been involved in this debate, like Tampa Mayor Dick Greco and Hillsborough County Commissioner Joe Chillura, believe that the federal government is the right forum to enforce civil rights.<sup>233</sup> Opponents of local anti-discrimination ordinances find it unimaginable that local governments would get involved in constitutional issues or that "you can be suing a businessman and using his own tax money to fight him" through a local human rights commission.<sup>234</sup>

When local governments pass anti-discrimination ordinances, local communities engage in heated debate and controversy. The current Tampa gay rights ordinance was passed, repealed, and passed again. In Cincinnati, an attorney from a major Ohio law firm was fired due to his support of a gay rights ordinance banning discrimination on the basis of sexual orientation which was passed by the city council and then revoked by a majority vote of city residents.<sup>235</sup> Passage of local government ordinances in cities including Denver, Boulder, and Aspen led to a statewide ballot initiative in Colorado

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231. See Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1511, 1668 (1989).

232. See Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 496 (1993).

233. See Gunter, *supra* note 162.

234. See Anna Griffin, *More Talk Sought on Civil-Rights Law—Alderman Want Sexual Orientation Added to Proposed Ordinance*, CHAPEL HILL HERALD, Mar. 10, 1994, at 3.

235. See *Greenwood v. Taft, Stettinius & Hollister*, [1995] 10 Indiv. Empl. Rts. Cas. (BNA) 1744 (Ohio Ct. App. Sept. 13, 1995); see also *Cincinnati Voters Repeal Ban on Employment Bias Against Gays*, 31 Gov't Empl. Rel. Rep. (BNA) No. 1539, at 1475 (Nov. 8, 1993) (describing the ordinance which banned housing and employment discrimination on the basis of sex, race, religion, and Appalachian heritage).

to prevent cities from giving special rights to homosexuals.<sup>236</sup> States like Maine, Oregon, and Idaho failed to pass similar ballot initiatives.<sup>237</sup> Though the Supreme Court found these initiatives unconstitutional in *Romer v. Evans*,<sup>238</sup> the controversy created by these local laws was divisive.

Although these measures may allow citizens to discuss these issues and help form local policy,<sup>239</sup> the harm done to community morale may outweigh any purported advantages of local government enforcement. Federal control would largely eliminate the numerous local battles that can tear apart local communities. Todd Simmons of the Human Rights Task Force of Florida suggests that employment law should be addressed at the state or federal level "to prevent these sort of local skirmishes that consistently force this issue onto the local ballot . . . [t]here's something inherently wrong about putting people's basic civil rights to a popular vote."<sup>240</sup>

The cost of fighting for passage or repeal of a referendum is high.<sup>241</sup> Proponents and opponents continually place referendums on the ballot as long as they obtain the requisite number of signatures. If the federal government takes control of these issues, these expensive practices will be eliminated.

The federal government has shown its willingness to consider expanding protection. The Employment Non-Discrimination Act (ENDA), which came within one vote of passing the Senate in 1996, was reintroduced in the 105th Congress.<sup>242</sup> The bill, with bi-partisan support, is expected to have more support in this Congressional session.<sup>243</sup> Both President Bill Clinton, who supports the bill, and Speaker Newt Gingrich who opposes the

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236. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (discussing the Colorado initiative).

237. See *Maine Voters Block Restriction on Rights Laws*, Daily Lab. Rep. (BNA) 217, at A-13 (Nov. 9, 1995); *Anti-Gay Rights Measures Appear to be Defeated in Idaho, Oregon*, Daily Lab. Rep. (BNA) No. 216, at A-6, (Nov. 10, 1994).

238. 517 U.S. 620 (1996).

239. Telephone Interview with Dorinda Mack, *supra* note 72. The City of New Orleans, for example, created its local anti-discrimination law with extensive input from the New Orleans community. In contrast, when the Normal, Illinois City Council considered banning discrimination on the basis of sexual orientation, opponents pelted gay rights advocates with eggs and made death threats, and advocates spray-painted "Gay Rights" on opponents' homes. Wes Smith & Jan Crawford Greenburg, *Illinois City Rejects Gay Rights Measure*, CHI. TRIB., May 8, 1996, at 4.

240. Gunter, *supra* note 162.

241. In St. Paul, Minnesota, one local campaign cost \$113,000, and a state-wide campaign in Oregon cost \$350,000. See Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW & INEQ. J. 441, 452 (1988).

242. See *infra* note 19; see also *supra* note 243.

243. See John E. Yang, *Gay Rights Measure*, WASH. POST, Mar. 9, 1997, at A7.

initiative have publicly stated their positions, signaling that the issue is one which captures the attention of national leaders.<sup>244</sup> When raised by an audience questioner during the 1996 Presidential Debate in San Diego, Senator Bob Dole and President Clinton discussed ENDA before millions in the viewing audience.<sup>245</sup>

In addition, supporters of expansive federal anti-discrimination laws are increasing their activity at the national level. Gay rights advocates have increased their influence over Congress, and according to some analysts, recent federal elections have brought additional supporters of this agenda to Washington.<sup>246</sup> Both members of Congress and private supporters of the ENDA have encouraged citizens to contact their members of Congress in an effort to increase support for the measure.<sup>247</sup> Similarly, opponents of the ENDA have made their opinions known at the federal level through organized lobbying campaigns.<sup>248</sup> The issue is one of national concern best handled at the national level.

Employers attempting to comply with federal law are under an extra burden when state and local laws put additional demands on them. Pennsylvania state legislators, while passing a bill that barred state and local governments from granting preferential treatment based on race, sex, or national origin in employment, specifically did not address the issue of preferential treatment by private employers because of a concern that a state law banning these practices would be burdensome to businesses seeking to comply with federal laws.<sup>249</sup>

A final alternative that may be preferable to state regulation, and even federal regulation, is leaving private companies free to choose their own employment policies. Most Fortune

244. See Carla Marinucci, *Gays Focus on Job Protection; Disappointed Leaders Agenda Shorter as Clinton Begins Second Term*, S.F. EXAM'R, Feb. 2, 1997, at A2; see also David Lawsky, *Gingrich Opposes Federal Job Protection For Gays*, REUTERS NORTH AM. WIRE, Mar. 7, 1995.

245. See Chuck Colbert, *Just Don't Ask: 70 Percent of Gay Voters Back Clinton and for Good Reason*, PHOENIX GAZETTE, Oct. 28, 1996, at B5, available in 1996 WL 7746664.

246. See Gabriel Rotello, *Surprise! 1994 Was a Good Year for Gay Rights*, NEWSDAY, Jan. 9, 1995, at A26.

247. See Deb Price, *Who is Listening to Popular Opinion*, DETROIT NEWS, Feb. 16, 1995.

248. See Deb Price, *Barney Frank Urges Gay-Rights Advocates to Put it in Writing*, STAR TRIB. (Minneapolis-St. Paul), Mar. 1, 1995, at E2, available in 1995 WL 3648161.

249. See *Pennsylvania House Approves Bill to Bar Preferential Hiring Treatment*, Daily Lab. Rep. (BNA) No. 57, at A-4 (Mar. 25, 1996).

500 corporations, and sixty-seven of the nation's one hundred largest law firms, have explicit ENDA-like policies.<sup>250</sup> The free market often is far more innovative than government. In 1975, AT&T became the first corporation to include sexual orientation in its nondiscrimination policy.<sup>251</sup> Today many companies have employment policies that ban discrimination on the basis of additional characteristics not protected at the federal level.<sup>252</sup> Allowing private corporations to decide unilaterally whether to extend anti-discrimination policies beyond current federal protections avoids the political controversies and exhaustion of resources required to debate these issues at the local, state, and federal levels. Private employers are "regulated" by consumers who can punish them for adopting unpopular employment practices by choosing not to be employees or purchase products and services. The private sector is more effective and efficient in crafting employment policies than local, state, and federal governments.

## CONCLUSION

Local governments' adoption of anti-discrimination ordinances that protect characteristics not protected by the federal or state government raises serious questions about what is the most sound policy for eliminating discrimination. A survey of local government human rights agencies shows that these agencies are rarely used and have a limited impact. Enforcement problems exist because local agencies are underfunded and unequipped with the appropriate remedies to combat employment discrimination. More restrictive local governments, by forcing employers to adopt policies that meet their regulations, cause employers to make uniform changes in employment practices for all of their facilities. Because local anti-discrimination laws are on the rise, any effects the laws have, either positive or negative, will be felt with even greater force in the future. In order to prevent such an escalation, local

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250. See James K. Glassman, *Leave it to the Marketplace to Decide Social Issues*, ARIZONA REPUBLIC, Oct. 13, 1996, at H5, available in 1996 WL 7746565.

251. See Deborah Kovach Caldwell, *Pro-gay Companies Targeted; Conservatives Say Values Compromised*, DALLAS MORNING NEWS, Mar. 15, 1997, at 1G.

252. For example, American Airlines not only has a written policy that forbids discrimination based on sexual orientation, but also has an employee group for gays, lesbians, bisexuals, and transsexuals. This practice goes beyond any requirement listed in the ENDA. See *id.*

governments should be taken out of the business of regulating private employment in this fashion. The federal government, armed with the ability to enact uniform laws that are effectively enforced, should be left to decide what regulations are best applied to private employers.

TABLE I:  
STATISTICS ON ENFORCEMENT OF LOCAL  
GOVERNMENT ANTI-DISCRIMINATION ORDINANCES<sup>253</sup>

*Number of Complaints / Percentage of Total*

Local Government	Chicago, Ill.		
	1993	1994	1995
Sexual Orientation	28 / 7%	31 / 9%	24 / 6%
Marital Status	3 / 1%	0 / 0%	5 / 1%
Military Discharge	0 / 0%	0 / 0%	1 / 0%
Source of Income	0 / 0%	1 / 0%	0 / 0%
Ancestry	21 / 5%	9 / 3%	12 / 3%

253. See COOK COUNTY COMMISSION ON HUMAN RIGHTS, WHERE TO FILE EMPLOYMENT DISCRIMINATION CLAIMS PAMPHLET (1996); Letter from Charles F. (Fred) Hearn, Administrator, City of Tampa Office of Human Rights/Community Services, to author (Feb. 24, 1997) (on file with the *University of Michigan Journal of Law Reform*); THE CITY OF PHILADELPHIA COMMISSION ON HUMAN RELATIONS 1995-96 ANNUAL REPORT 9; (PHILADELPHIA COMMISSION ON HUMAN RELATIONS) SUMMARY OF RECEIVED CASES, (Mar. 3, 1997) (on file with the *University of Michigan Journal of Law Reform*); THE CITY OF NEW ORLEANS HUMAN RELATIONS COMMISSION, 1996 ANNUAL REPORT 7, (on file with the *University of Michigan Journal of Law Reform*); Letter from Michael Daisy, Staff Investigator, City of Detroit Human Rights Department, to author (Mar. 17, 1997) (on file with the *University of Michigan Journal of Law Reform*); Telephone Interview with Raymond Chauncey, City of Ann Arbor Human Rights Division (Feb. 18, 1997); Telephone Interview with Corey Roskin, Acting Chair, Social Services, City of West Hollywood (Feb. 12, 1997); Telephone Interview with Ruth Jaworski, Equal Opportunity Officer, City of Columbus Community Relations Commission (Mar. 4, 1997).

*Number of Complaints / Percentage of Total*

Local Government	Tampa, Fla.		Philadelphia, Pa.	
Year	1995/96	1996/97	1995	1996
Sexual Orientation	1 / 1%	3 / 2%	27 / 11%	17 / 4%
Marital Status	0 / 0%	0 / 0%	n/a	n/a
Military Discharge	n/a	n/a	n/a	n/a
Source of Income	n/a	n/a	n/a	n/a
Ancestry	n/a	n/a	n/a	n/a

*Number of Complaints / Percentage of Total*

Local Government	New Orleans, La.			
Year	1992/93	1993/94	1994/95	1995/96
Sexual Orientation	3 / 23%	6 / 24%	3 / 7%	4 / 11%
Marital Status	0 / 0%	0 / 0%	0 / 0%	0 / 0%
Military Discharge	n/a	n/a	n/a	n/a
Source of Income	n/a	n/a	n/a	n/a
Ancestry	n/a	n/a	n/a	n/a

Number of Complaints / Percentage of Total

Local Government	Detroit, Mich.	W. Hollywood, Cal.
Year	1996	—
Sexual Orientation	5 / 8%	0 / 0%
Marital Status	0 / 0%	0 / 0%
Military Discharge	n/a	n/a
Source of Income	n/a	n/a
Ancestry	n/a	n/a



